



# STATE OF INDIANA

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August 19, 2011

Mr. Curtis L. Westbrook  
1113 East Sixth Street  
Muncie, Indiana 47302

*Re: Formal Complaint 11-FC-203; Alleged Violation of the Access to Public Records Act by the City of Muncie*

Dear Mr. Westbrook:

This advisory opinion is in response to your formal complaint alleging the City of Muncie ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The City's response is enclosed for your reference. I have granted your request for priority status pursuant to 62 Ind. Admin. Code 1-1-3(3).

## BACKGROUND

In your complaint, you allege that you made an oral records request of the City on June 29, 2011, to which you received a partial response on July 19, 2011. On July 20, 2011, you made an additional oral request for the same information request on June 29, 2011, plus additional information. On August 1, 2011, you made a further request via email and the City's website for the same information and additional information. On August 2, 2011, you allege that City Attorney Dan Gibson acknowledged your request and that the City would make records responsive to your request available in a reasonable period of time. On August 9, 2011, you received correspondence from the City that provided records responsive to your request but indicated that any further records were no longer in the City's possession.

In response to your formal complaint, the City disputed that your initial request for records occurred on June 29, 2011. The City advised that on July 6, 2011 you attended a City Board of Works meeting and requested copies of affirmative actions plans for contractors that had worked on certain public works projects within the previous year. The specific projects were defined in City Code of Ordinances Sec 31.13. The City's Attorney, Dan Gibson, verbally acknowledged your request at the July 6, 2011 meeting and provided that the City would attempt to locate the requested documents and provide the records within a reasonable period of time. Upon reviewing the relevant ordinance, Mr. Gibson discovered only a few projects within the past year that fell within

its purview. As such, Mr. Gibson requested from the City Superintendent of Public Works and the Superintendent of Parks and Recreation the affirmative action statements/plans for all contractors pursuant to the respective code for the previous year. Mr. Gibson was informed by the Parks Superintendent that the documents were not in its possession, but could be retrieved from the City's third-party project manager.

The City received an additional records request from you on August 1, 2011. Mr. Gibson responded to your request via email the following day and provided that the City had received your request and would provide the records within a reasonable period of time. On July 19, 2011, the City provided you with the affirmative action statements/plans for Contractors completing street projects for the previous year. On August 9, 2011, additional documents responsive to your request were provided; at which time the City informed you that the other documents requested "were no longer in the possession of the City."

The City has provided that it mistakenly informed you on August 9, 2011 that the records were no longer in its possession. Rather, it had been discovered that due to an oversight, the contract compliance program to which you had requested documents had not been specifically adhered to since approximately 1996. Although the City has at all times maintained compliance with state and federal laws related to affirmative action, it no longer had an affirmative action form approved by the Board of Works or approved notice of contractors. As such, the City maintains that they have provided all documents responsive to your request and had responded to your requests within a reasonable period of time.

#### ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here there is some dispute as to

when you made your initial records request of the City. You provide that your initial request was made on June 29, 2011; the City maintains that the initial request was submitted on July 6, 2011.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. If the City received your initial request on June 29, 2011 and its only response was provided on July 19, 2011, it acted contrary to section 9 of the APRA. On the other hand, if the Office received your oral request on July 6, 2011 at the meeting of the Board of Works and Mr. Gibson orally acknowledged your request and provided that the City would respond within a reasonable period of time, then the City fulfilled its obligations under the APRA. If the City failed to respond to your July 20, 2011 request, it again acted contrary of section 9 of the APRA. As the City responded to your August 1, 2011 request the following day, it did not violate the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See I.C. § 5-14-3-7(a)*. However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See I.C. § 5-14-3-7(c)*. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*.

Here, the City provided an initial disclosure of records on July 19, 2011, which at the latest, would have been twenty-two (22) days after your initial request. The City submitted its second and/or final disclosure on August 9, 2011, which at the latest would have been forty-three (43) days after your initial request and eight days after your second request. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184 and 08-FC-56*. Further, the APRA *requires* public agencies to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See I.C. § 5-14-3-6(a)*. (emphasis added).

Under the circumstances provided, it is my opinion that City has not acted unreasonably. Under the APRA, a public agency shall “regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.” *See I.C. § 5-14-3-7(a)*. *See also Opinion of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where

agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); *see also Opinion of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to respond to seven requests with approximately 1000 pages of responsive documents; 34 days was not unreasonable amount of time to produce three-page document considering number of other pending requests); *see also Opinion of the Public Access Counselor 11-FC-72* (four months was not an unreasonable amount of time to respond to thirteen expansive requests when the City made multiple disclosures of records pursuant to the request during the time period, all while handling a separate request which resulted in the production of over three-thousand pages of documents). In response to your multiple requests, the City was required to review the respective City Ordinance and retrieve records responsive to your request from Department of Public Works, the Superintendent of Parks and Recreation, as well as a third-party project manager. Many of the documents retrieved involved a City program that had not been operational since 1996. After receiving the records from the respective City agencies, the City was required to review the documents pursuant to the APRA. Further, as the records become available, the City made multiple disclosures pursuant to your requests. All the while the City was responding to your requests, it was required to maintain the regular duties required of the office. As such, I do not believe the City took an unreasonable amount of time to collect, review, and reproduce the records in response to your request.

If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *See Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. Thus, the City did not violate the APRA by failing to produce records when no such records existed.

The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). If you believe that the City has not properly preserved and maintained its public records, I would direct you to contact the Indiana Commission on Public Records.

## CONCLUSION

For the foregoing reasons, it is my opinion that if the City received your initial request on June 29, 2011 and its only response was provided on July 19, 2011 it acted contrary to section 9 of the APRA. On the other hand, if the Office received your initial request on July 6, 2011 and on the same day orally acknowledged its receipt and informed you that it would respond to it within a reasonable period of time, then the City fulfilled its obligations under the APRA. If the City failed to respond to your July 20, 2011 request, it acted contrary to section 9 of the APRA. As the City has now produced all responsive records, it has not otherwise violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" at the end.

Joseph B. Hoage  
Public Access Counselor

cc: Daniel J. Gibson